No. 98-10

In The

Supreme Court of the United States

October Term, 1998

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM ACKER and U.W. CLEMON,

Respondents.

On Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITIONER'S REPLY BRIEF

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Introduction

The lynchpin of the judges' argument on the Supremacy clause issue is their premise that the consent to state and local taxation expressed in the Public Salary Tax Act, the Buck Act and 5 U.S.C. § 5520 is limited to traditional income tax and therefore does not include the county license tax. The error in that premise is revealed by reviewing the language of the three statutes.

The consent in the Public Salary Tax Act is not limited to any form of tax. The absence of the word "income" or other limiting adjective preceding the word "taxation" confirms Congressional intent to consent to all forms of non-discriminatory state and local tax on pay or compensation. That would include license tax. If Congress had intended to limit the consent in the Public Salary Tax Act to a traditional income tax as suggested by the judges it would have done so by using a narrow term like "income tax" instead of the much broader word "taxation".

The foregoing conclusion that the Public Salary Tax Act consents to the levy of license tax on federal employees is also confirmed by the language used in the subsequent Buck Act. There Congress expressly included license tax in its description of the taxes which federal employees are required to pay. It is axiomatic that Congress would not require federal employees pursuant to the Buck Act to pay a license tax to which it had not consented in the Public Salary Tax Act. That conclusion is

also confirmed by the language used in Title 5, United States Code, § 5520, through its implementing regulation 31 C.F.R. § 215.2, which also expressly includes license tax in the description of the local taxes which federal paymasters are to withhold and remit to local taxing authorities. It is axiomatic that Congress would not direct federal paymasters pursuant to 5 U.S.C. § 5520 to withhold and remit to local taxing authorities a license tax to which it had not consented in the Public Salary Tax Act.

Review of the language used in the three statutes confirms the opposite of the judges' premise. Congress did consent to the levy of license tax on the pay of federal employees provided only that the tax not discriminate against the employee on account of the source of compensation. Therefore, it makes no difference whether the county tax is an income or license tax because Congress has consented to both forms of tax on pay or compensation. The hairsplitting over that distinction in the judges' brief and the court of appeals' opinion leads nowhere. We urge the Court not to become embroiled in the minutia of the judges' abstract argument as the court of appeals did and lose sight of the fact that Congress has already rendered their immunity argument moot by waiving their immunity.

1. The Public Salary Tax Act, 4 U.S.C. § 111

With regard to the Public Salary Tax Act the judges make two arguments: (a) The Public Salary Tax Act does not consent to a license tax and (b) a tax with exemptions amounts to "discrimination against occupations" which violates the Public Salary Tax Act.

(a) The Public Salary Tax Act does consent to a license tax

The judges suggest without citing any authority that the county license tax is not included in the consent contained in the Public Salary Tax Act. That Act simply states that Congress consents to "taxation on pay or compensation" by a state or local taxing authority. As discussed in the introduction above, Congress could have but did not limit the broad term "taxation". Since the term taxation is not limited it is reasonable to conclude that Congress intended that it include all forms of nondiscriminatory local tax including license tax. That conclusion is confirmed by the fact that license tax is expressly included in the both the Buck Act and 5 U.S.C. § 5520, as implemented by 31 C.F.R. § 215.2. It follows that Congress would not direct federal paymasters pursuant to 5 U.S.C. § 5520 to withhold a license tax to which it did not consent. Nor would Congress require pursuant to the Buck Act that federal employees who work and reside in a federal area pay a license tax to which it did not consent. It is unreasonable to interpret the Public Salary Tax Act in a manner that would leave those two subsequent statutes with no field of operation.

Moreover, in deciding *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953), this Court must have concluded that the Public Salary Tax Act consented to the levy of the Louisville license tax. Otherwise, there would be no basis for the Court requiring any federal employee to pay the Louisville tax. The Court's conclusion is confirmed by the last sentence of the next to last paragraph of the opinion, 344 U.S. at 629, where the Court held:

> By virtue of the Buck Act, the tax can be levied and collected within the federal area *just as if it were not in a federal area.*

Id.

That sentence raises the question: from where did the city obtain the authority to collect the license tax from federal employees in non-federal areas? The only possible answer is from the Public Salary Tax Act.

The judges reach their opposite conclusion about the Public Salary Tax Act only by interpreting it in a vacuum without reference to the other two statutes; a practice disfavored by this Court.

> . . . statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

Davis v. Michigan Dept. Of Treasury, 489 U.S. at 809.

One flaw in the judges' interpretation is illustrated by considering what would happen if they were right. The Buck Act would then be the only source of Congressional consent to license tax but it is limited to federal areas. Respondents and the *amici* judges both suggest that a federal area does not include a courthouse. That would mean Congress intended that only *some* federal employees pay license tax depending on the area where they work. The facts of *Howard v. Commissioners* illustrate the inequality and illogic of their interpretation. The federal employees who reside and work on the military base in Louisville, Kentucky would have to pay Louisville's license tax but the other federal employees working in

the downtown courthouse would escape the tax. Acceptance of the judges' interpretation leads to the illogical and improbable conclusion that, with respect to license tax, Congress intended to create two classes of federal employees, a favored class which includes judges who escape license tax and a non-favored class which includes others who pay license tax. There is nothing in the plain language of the Public Salary Tax Act, the Buck Act, 5 U.S.C. § 5520 or their respective legislative histories which support that result.

Like Alabama and Kentucky, most states prohibit their cities and counties from collecting a traditional income tax and only allow them to raise revenue from license and sales taxes. That reality was recognized in the Senate Finance Committee report on the Buck Act and was *the* reason Congress deliberately chose to define the term income tax in the Buck Act as including local license tax:

> [t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different state laws. The intent of your committee in laying down such a broad definition was to include therein any state tax, whether known as a corporate-franchise tax, or business privilege tax, or any other name if it is levied on, with respect to or measured by net income, gross income or gross receipts.
>
> * * *
>
> The Buck Act "income tax" broadly defined as it is, refers to the broad, generic class of taxes upon income. It does not require that the tax be denominated an income tax or that it conform to

> the federal income tax. If the tax in question is based upon income and is measured by that income in money or money's worth, if a net income tax, gross income tax or gross receipts tax, it is an "income tax".

Report of Senate Finance Committee, quoted in *Humble Oil and Refining Company v. Calvert*, 478 S.W.2d 926, *cert. denied*, 409 U.S. 967 (1972).

If adopted by the Court, the judges' interpretation of the Public Salary Tax Act would have far reaching and devastating consequences on many cities and counties in the United States that depend on license taxes as their primary revenue source. The Court's holding would effectively exempt *all* federal employees (except in the handful of municipal jurisdictions like Washington D.C. which levy a traditional income tax) from sharing in the cost of their local government. The loss of revenue from the large numbers of persons with a federal employment connection who would claim an exemption (in Jefferson County there are approximately 12,000), would threaten the solvency of many local governments. As a result the ability of cities and counties to provide vital public services would be substantially impaired. Immunizing several judges from the county tax is an insufficient reason for the Court to loosen such havoc on the legal landscape which has worked well for more than sixty years with respect to each sovereign's ability to tax the pay of the other's employees. Immunizing several judges is also insufficient reason to resurrect notions of tax immunity that the Court and Congress abandoned in the 1930's.

(b) The judges' new discrimination argument.

The judges' brief contains a new discrimination argument made now for the first time *seven years after this litigation commenced*. The judges' new argument, echoed in the *amici* judges' brief, is that the county tax discriminates against *occupations*. Without explaining how, the judges extrapolate that a tax which contains exemptions violates the Public Salary Tax Act. At the outset the Court is advised that there is no evidence in the record to support the judges' claim. The Court is reminded that the trial court correctly found that "the county tax does not discriminate against the federal officer or employee because of the source of his pay or compensation" (Pet. App. 89-90). The judges failed to appeal that finding. Noting their failure to appeal or address the finding, the court of appeals stated: "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it." (Pet. App. 34, n. 9.)

The premise of the judges's new argument is that exemptions in a tax equate to a violation of the Public Salary Tax Act.[1] That premise is erroneous because the

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[1] At footnote 4 of their brief the judges erroneously state that *Richards v. Jefferson County*, Jefferson County Circuit Court Number CV 92-319, and pending legislation may eliminate the controversy in this case. There is no legislation pending which would exempt federal judges from the county tax. The Court is advised that the *Richards'* trial court recently entered a non-final order which *may* eliminate the judges' new discrimination argument. That order declares that the portions of Act 406 and Ordinance 1120 which exempt persons required to pay state license tax violates the equal protection clause of the federal

Public Salary Tax Act does not require that a tax be free of exemptions. That is confirmed by *Howard v. Commissioners* where the Louisville license tax contained exemptions like the county tax. (*See* discussion of *Louisville* tax exemptions, *infra*.) According to the judges, the presence of those exemptions would render Louisville's tax invalid and the case wrongly decided by the Court. Further, since most states' income tax laws (including Alabama) exempt charitable, religious and governmental entities and certain individuals who are disadvantaged or earn less than a threshold amount, the judges would have the Court find those taxes are also invalid as applied to federal employees. The county knows of no tax, federal, state or local which does not contain some form of exemption. If the presence of an exemption violates the Public Salary Tax Act then it follows that federal employees escape all state and local tax. But, the mere presence of an exemption is not the test Congress chose to determine whether a tax violates the Public Salary Tax Act.

The correct and only test in the Public Salary Tax Act is whether the tax discriminates against the federal

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Constitution. Since the Act and Ordinance have severability clauses the order's effect, if it survives appeal, would be to remove the exemptions from the county's tax thereby eliminating the judges' new discrimination argument. However, a jurisdictional defect in the *Richards* case related to the plaintiffs' failure to serve the Alabama Attorney General with the summons and complaint may result in the *Richards* case being dismissed. Under Alabama law serving the Attorney General is an absolute jurisdictional requirement in cases, like *Richards*, which challenge the constitutionality of a state statute. That issue is presently before the Alabama Supreme Court.

employee *on account of the source of that employee's compensation*. With regard to the county tax, the flaw in the judges' argument is illustrated by considering domestic employees in the home. They are exempt from the county tax. If, for discussion purposes, the White House were located in Birmingham the domestic federal employees would be exempt from the county tax, not because of the identity of their employer or their source of compensation but because the occupation itself is exempt. The same is true for ministers. An Army chaplain assigned in the county would be exempt along with all other ministers, not because of the identity of his employer or the source of his compensation but because the occupation itself is exempt. Unlike the Michigan state income tax in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), the exemptions from the county tax are available regardless of the identity of the employer or the source of the compensation. The violation in the *Michigan* case occurred by Michigan providing favorable treatment to a class of persons *because of the identity of their employer - the source of their compensation (i.e. state retirees).* The county tax creates no classes, favorable or unfavorable, based on the identity of an employer or the source of the taxpayer's compensation. That pivotal difference renders the holding in *Davis v. Michigan Department of Treasury* inapposite to this case.

The County tax does not favor or discriminate against anyone on account of the identity of their employer or the source of their compensation. This satisfies the only requirement of the Public Salary Tax Act.

2. The Buck Act, 4 U.S.C. § 105-109

Respondents and the *amici* judges suggest that the Court define the Buck Act term "federal area" so as to carve out a federal courthouse or other federal building where judges work. The Buck Act's definition of the term "federal area" is unambiguous: "lands or premises held or acquired for the use of the United States or any department, establishment or agency of the United States . . ." There is nothing in that definition which could reasonably be interpreted to exclude a federal courthouse. The plain language is very broad and includes *all land or premises* used by every department or agency of the federal government. That would obviously include buildings such as a federal courthouse. As discussed in section 1 above, it is illogical to interpret the Buck Act as creating two classes of federal employees with some paying license tax and others escaping license tax based on where they work.

3. 5 U.S.C. § 5520

In their brief respondents state that no federal paymaster has withheld or remitted the county tax pursuant to 5 U.S.C. § 5520. They are wrong. All federal paymasters *except the Administrative Office of Courts* have withheld and remitted the county tax.

4. *Howard v. Commissioners*, 344 U.S. 624 (1953)

Like the dissent on the court of appeals, respondents and the *amici* judges recognize that if *Howard v. Commissioners* cannot be distinguished from this case it compels

the conclusion that they are liable for the county tax. The judges therefore attempt to distinguish *Howard* with the argument that the Louisville tax: (a) contains no language which makes it unlawful to work without first complying with the ordinance and (b) contains no exemptions for domestic servants, ministers, state taxed occupations, etc. *They are wrong.*

(a) The city of Louisville tax makes it unlawful to perform work in that city without paying the tax.

Respondents and the *amici* judges erroneously informed the Court that the Louisville Ordinance does not make it unlawful to work without first complying with its Ordinance. Section 112.99, Louisville, Kentucky Occupational Tax Ordinance provides:

> § 112.99 *PENALTY.*
>
> (A) Any person who shall engage within the city in any business, profession, occupation, or other activity subject to the license fee imposed under this chapter and who shall fail to apply for an occupational license fee reporting number and to complete the questionnaire as required by § 112.05 shall be subject to a fine of not more than $100.
>
> * * *

A complete copy of the Louisville occupational tax ordinance has been lodged with the Court and provided to counsel. The Court is invited to read the remainder of § 112.99 which describes substantial additional unlawful conduct.

The judges make much of the term "unlawful" in the County's Ordinance 1120 but the term is actually insignificant. An Alabama county has no inherent authority or jurisdiction to make laws. That fundamental proposition was succinctly stated by the Alabama Supreme Court in *Tuscaloosa County v. Alabama Great Southern Railroad Company*, 227 Ala. 429, 150 So. 328 (1933) as follows:

> A county is but a governmental agency possessing no power and subject to no duty not originating from the law by which it is created, and in which its functions are defined. Whatever of power may be delegated to the county is the power of the state, and its nature is not changed by the delegation. [Citations omitted] A county has no inherent jurisdiction to make laws.

227 Ala. at 432.

The state's delegation of the power to tax in Act 406 does not criminalize non-payment of the tax. No other provision of Alabama law criminalizes non-payment of the County tax. Therefore, the county is without power to criminally prosecute delinquent taxpayers and cannot prevent the Respondents from performing their duties as federal judges. The county's only remedy is a civil suit to collect the tax. The use of the term "unlawful" in Ordinance 1120 is synonymous with saying it is unlawful to refuse to pay any civil debt.

In a related argument the judges suggest that the county tax purports to regulate their performance of duties. The county occupational tax was levied for one purpose, to raise revenue for the operation of county government. Act 406 does not authorize the county to regulate or control any profession. As set forth in the

affidavit of Randy Godeke [R1-25-29] the county has never attempted to regulate or control any profession through the levy of the occupational tax. Moreover, the county does not even issue licenses to the taxpayers. It is undisputed that the county has never attempted in any manner to regulate, direct or control the activities of the federal judge. Respondents admitted in their interrogatory answers that the county has never attempted to restrain, obstruct, arrest, prosecute or otherwise regulate them in the performance of their duties. [*See* Respondents' answers to the county's interrogatories 22-26, Acker's answer at R1-25-50, Clemon's answer at R1-25-57] The levy of occupational tax on Respondents' wages no more regulates their activities than the levy of income tax thereon by the state of Alabama.

(b) The city of Louisville tax exempts certain state taxed occupations, ministers and domestic servants.

Respondents and *amici* judges erroneously informed the Court that Louisville's occupational tax does not contain exemptions. Section 112.15, Louisville, Kentucky Occupational Tax Ordinance provides:

> § 112.15 *EXEMPTIONS.*
>
> (A) Insurance companies, corporations, firms, individuals, or associations who are licensed under §§ 112.25 through 112.32 are not required to pay a license fee measured by net profits under the terms of this chapter.
>
> (B) Because of the great costs of administration and difficulty of collection involved, domestic servants employed in private homes are exempt

from the terms of this chapter and no license is required.

(C) The occupation of serving as a duly ordained minister of religion is exempted from the terms of this chapter and no license fee is required. . . .

* * *

The Court is invited to read the remainder of § 112.15 to consider the many other exemptions.

Respondents fail in their effort to distinguish Louisville's tax from the county tax because the two taxes are indistinguishable. They both make it unlawful to work without paying the tax. They both contain nearly identical exemptions. They are both license taxes under state law. They are both income taxes under the Buck Act. The Court should apply the same reasoning as it did in *Howard v. Commissioners* to find that the Buck Act definition of the term "income tax" should be applied to the county tax without regard to its state law denomination. The county tax is an income tax under that Buck Act definition because the tax is measured by gross receipts. Therefore, the Court should hold that the judges are liable for the county tax under the Buck Act in line with *Howard v. Commissioners*.

5. *Johnson v. Maryland*, 254 U.S. 51 (1920)

The judges cite *Johnson v. Maryland*, (holding state cannot require postal employee to submit to driver's license law) for the proposition that the Supremacy clause prohibits a county from licensing a federal employee. We

agree that, *absent Congressional waiver*, the Supremacy clause would preclude a state from subjecting a federal employee to a driver's license law. *Johnson v. Maryland* was correctly decided in 1920 because Congress had not yet waived federal employees' Supremacy clause immunity from state driver license laws. However, Congress has now partially waived that immunity by not only consenting but requiring states to license federally employed drivers of commercial vehicles. *See* 49 U.S.C. § 31301-31317 (§ 31301(7) & (8) defining "employee" and "employer" to include the United States) and 49 C.F.R. § 383.5 (including federal employees in the state licensing of federal commercial vehicle drivers). There is nothing in the foregoing statutes or regulations that exempts Postal Service employees from the requirement, therefore, it appears that Congress has legislatively overruled *Johnson v. Maryland* by waiving the Supremacy clause immunity on which that case was decided.

The foregoing illustrates how Congress can waive a federal employee's immunity from state licensing laws. We submit that Congress waived federal employees' immunity from non-discriminatory state and local license tax in the same manner by enacting the Public Salary Tax Act, the Buck Act and 5 U.S.C. § 5520.

B. THE COUNTY'S REPLY TO THE JUDGES' ARGUMENTS ON JURISDICTION

With regard to the jurisdiction issue, the judges make two arguments: (a) the Tax Injunction Act is not a jurisdictional barrier; it merely prohibits a federal court from using an injunction to interfere in state tax matters and

(b) the Federal Officer Removal Statute overrides the Tax Injunction Act.

(a) The Tax Injunction Act is a jurisdictional barrier.

Respondents and the *amici* judges make the same argument the Court heard in *California v. Grace Brethren Church*, 457 U.S. 393 (1982). There the Court was urged to construe the Tax Injunction Act as narrowly as possible and hold that it does not operate as a jurisdictional barrier but only precludes a federal court from enjoining the collection of a state tax. Recognizing (a) that the Congressional purpose for enacting the Tax Injunction Act was to prevent federal court interference *in any manner* with state tax matters and (b) that the suggested narrow construction would leave federal courts free to interfere in state tax matters with every means short of an injunction thereby defeating the purpose of the Tax Injunction Act, the Court rejected the argument. The following quotes from its opinion demonstrate the Court's reasoning:

> . . . because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act. . . .

457 U.S. at 408.

* * *

> Nevertheless, the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, *as about divesting the federal courts of jurisdiction to interfere with state tax administration.* [Emphasis added]

457 U.S. at 408, fn. 22.

* * *

> Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief.

457 U.S. at 411.

We urge the Court not to reverse its holding or reasoning in *Grace-Brethren Church*. There is no reason in this case to abandon the long standing rule of federal non-interference with state taxation as urged by the judges. Instead, the Court should use this case to ratify the proposition that the Tax Injunction Act is a jurisdictional barrier and that it applies whether a taxpayer brings the case to federal court by removal or by filing the initial complaint. The Court is reminded that it was the judges, not the county, who brought this case to federal court. Therefore, this case does not present the question of whether the Tax Injunction Act bars a taxing authority from suing in federal court to collect a tax and the Court need not decide that question to resolve this case. Whether by removal or by filing the complaint initially, the judges are seeking exactly what is forbidden by the Tax Injunction Act, federal interference with the

collection of state tax. We urge the Court to strengthen, not weaken, the concept of federal non-interference in state taxation and the Tax Injunction Act.

(b) The judges' interpretation of the federal officer removal statute defeats the purpose of the Tax Injunction Act.

Respondents and the *amici* judges suggest that the Court apply a rule of statutory construction and hold that statutes like the Federal Officer Removal Statute which grant jurisdiction should be broadly construed and statutes like the Tax Injunction Act which withhold jurisdiction should be narrowly construed. Under that rule of construction the Federal Officer Removal Statute would restore the jurisdiction extinguished by the Tax Injunction Act[2] If adopted by the Court, the same reasoning could be applied by the lower courts with equal force to other jurisdiction granting statutes like the federal question and diversity statutes. The same rule of construction

[2] The county wishes to make it clear that it does not agree that § 1442 provides a basis for the judges to remove this case to federal court. That statute permits removal only where a federal officer is sued in state court for actions taken under color of office or in the performance of duties. The judges' duties do not require them to refuse to pay taxes. Their refusal to pay was a private action without authority from and against the advice of their employer, the United States. Their refusal to pay was also unrelated to any judicial act or proceeding and could not possibly be an act performed under color of office. The judges fail both tests for removal under § 1442. In the county's opinion that renders the Tax Injunction Act issue moot since there was no federal jurisdiction at the outset.

would compel the same conclusion; that the federal question and diversity statutes should be read broadly to restore the jurisdiction extinguished by the Tax Injunction Act. The Tax Injunction Act would then have no field of operation.

Rules of statutory construction are not used to interpret unambiguous statutes. *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997); *Reves v. Ernst & Young*, 507 U.S. 170 (1993). The Tax Injunction Act is unambiguous. Its legislative history, quoted at footnote 22 of the *Grace Brethren Church* opinion, leaves no doubt and this Court has already held that its purpose is to deprive federal courts of jurisdiction to interfere in any manner in state tax matters. It follows that if the Act operates to deprive courts of jurisdiction, it makes no difference where that jurisdiction originated. Regardless of its source, the jurisdiction is extinguished by the Tax Injunction Act. The county agrees with the court of appeals' reasoning on this issue and urges the Court to adopt its holding. That would be consistent with this Court's admonition that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text". *Arkansas v. Farm Credit Services*, 117 S.Ct. 1776, 1780 (1997).

C. CONCLUSION

With regard to the jurisdiction issues, the county requests the Court to: (1) hold the case was improperly removed because the judges' refusal to pay the tax was not done in the performance of their duty or under color

of their office; or (2) hold that the Tax Injunction Act deprived the district court of jurisdiction over this case; and, (3) hold that the judicial exception to the Tax Injunction Act is not available because the United States is not a co-party. The case should be remanded to state court for lack of jurisdiction.

With regard to the Supremacy clause issue, the county requests the Court to hold that, because Congress waived the judges' immunity from the county tax, Supremacy clause and intergovernmental tax immunity violations did not occur. The court of appeals should be reversed and judgment entered in favor of the county in line with *Howard v. Commissioners*.

The county reminds the Court that the trial court also found that the county tax violated the Compensation clause but the court of appeals failed to address that issue. In the event the Court rules for the county, the Court should either rule on the Compensation clause issue or remand the case to the court of appeals for consideration of that issue.

Respectfully submitted,

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